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Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, submitted in accordance with resolution 8/6 of the Human Rights Council.

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Interim report of the Special Rapporteur on the independence of judges and lawyers

Summary

The present report addresses the need to establish, strengthen and develop a strong judiciary within the national criminal justice system, composed of independent and impartial judges and magistrates, as a fundamental tool in the fight against impunity. According to the Special Rapporteur, a human rights violation, a crime or an offence which goes unpunished is the source of the commission of other crimes or violations. Impunity undermines democracy, the rule of law and people's trust in State institutions.

The Special Rapporteur closely examines the role that judicial actors play within the criminal justice system to ensure accountability for human rights violations and crimes, and provides examples to illustrate the relationship between national and international criminal justice systems. The Special Rapporteur examines and evaluates obstacles and factors that hinder the effective investigation, prosecution and adjudication of violations and addresses issues relating to enhancing the criminal justice system at its various levels. She also analyses how national criminal justice systems can be structured using the human rights-based approach at the institutional and organizational levels to combat impunity.

Impunity may be perpetuated owing to political interference in the functioning of the criminal justice system and restrictions placed on the exercise of judicial authority. The judiciary should never be under the de jure or de facto control or direction of the executive branch of government. States must respect the independence of the judiciary and measures should be taken to comply fully with the guarantees for judicial independence. The Special Rapporteur concludes that without independence of the judiciary there is no separation of powers and without separation of powers there is no rule of law or democracy.

Accordingly, States must provide adequate resources to enable the judiciary to perform its functions properly and, most importantly, States must assure the protection of all judicial actors against attacks, threats and acts of intimidation or reprisals. No such acts should go unpunished. In those States where impunity is prevalent, special mechanisms should be urgently established to ensure compliance with judicial orders, sentences and resolutions.

The Special Rapporteur identifies judicial corruption as a factor contributing to impunity. To counter judicial corruption, systems for allocating cases to judges should be transparent. She also notes that impunity cannot be combated in the absence of efficient witness protection programmes. Continuing human rights legal education, most notably in regard to adequate knowledge of the relevant international standards and jurisprudence, is an essential tool to foster the capacity of judges, prosecutors and lawyers to combat impunity.

In her recommendations, rooted in the concepts of democracy, separation of powers and the rule of law, the Special Rapporteur calls on States to develop a human rights-based approach when developing an impunity strategy. The principles of participation and inclusion; apportioning the roles of duty-bearers and rights-holders; focus on vulnerable groups; legal empowerment; transparency and

accountability and identification of obligations, should be taken into account. She recommends designing a mapping exercise; the creation of an appropriate database; and strengthening awareness-raising and participation. Furthermore, the Special Rapporteur believes that the work of truth and reconciliation commissions and other commissions of inquiry can be complementary to the essential role of judicial mechanisms in protecting human rights and combating impunity.

The Special Rapporteur also analyses recent developments in the field of international justice. She calls upon States to cooperate fully with the international tribunals, in particular with the International Criminal Court, and to implement in full their decisions and resolutions, as well as their arrest warrants. She also calls upon those tribunals to constitute a model in respect of due process and of the rights of detainees to a fair trial.

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I. Introduction

1. In the present report the Special Rapporteur examines the subject of combating impunity for human rights violations through the national criminal justice system and analyses the role of judicial actors to ensure accountability for human rights violations. The report addresses the root problems that lead and contribute to impunity and evaluates the obstacles and factors that hinder the effective investigation, prosecution and adjudication of violations. The report also analyses how national criminal justice systems can be structured using a human rights-based approach at the institutional and organizational levels to combat impunity. The report further highlights the relationship between national and international criminal justice to combat impunity.

2. The report, presupposing that long-term and sustainable solutions for addressing impunity should aim mostly at building and improving the domestic capacity of criminal justice systems to ensure accountability, will focus on the need to develop an effective criminal justice system at the national level as a fundamental and indispensable tool to combat impunity. The Special Rapporteur addresses issues relating to enhancing the criminal justice system at the investigative, prosecutorial, adjudication and remedial/enforcement levels. Reforming the criminal justice system cannot in itself combat impunity; that will require systematic reform of other State institutions also.

3. Impunity is a cause and a consequence of, inter alia, State instability, erosion of the rule of law, weak accountability mechanisms and the imposition of limitations on the enjoyment of human rights. While the root causes of impunity are multifaceted and go beyond the judicial system,[1] impunity is sustained in situations where there is a weak and dysfunctional criminal justice system.[2] In a context where there is no accountability for human rights violations, a culture is often established and perpetuated which provides a framework for the commission of further violations by Government and non-State actors, including ill-treatment and torture, extrajudicial killings, arbitrary detentions, enforced disappearances and violation of due process rights. Victims are unable to seek redress and this may lead to loss of trust, respect and legitimacy for the judicial system in some contexts, resulting in communities choosing alternative means of dispute resolution, such as vigilantism, mob justice or other forms of private justice.[3]

II. Activities of the Special Rapporteur

4. The activities carried out by the Special Rapporteur from her appointment in August 2009 to March 2010 are referred to in the report she submitted to the Human Rights Council on 9 April 2010 (A/HRC/14/26). Since that time, the Special Rapporteur has participated in various conferences and meetings, in addition to taking action, on a daily basis, in response to communications and allegations received from individuals and organizations.

[1] See E/CN.4/2004/60, paras. 36-38.
[2] See A/HRC/14/24, para. 53.
[3] A/64/187.

5. In her report to the Human Rights Council, the Special Rapporteur pointed out the need for continuing education in international human rights law for judges, prosecutors and lawyers. During the fourteenth session of the Human Rights Council, on 4 June 2010, the Special Rapporteur convened a side event on her thematic report, organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the Permanent Missions in Geneva of Brazil and Hungary, on the issue of "Capacity-building and human rights training as a fundamental pillar for judicial independence". The Special Rapporteur was a speaker at another side event, organized by various non-governmental organizations on 3 June 2010, on "Protective measures for judges and lawyers". From 29 June to 3 July, the Special Rapporteur participated in the annual meeting of mandate-holders of the special procedures, held in Geneva.

6. From 12 to 14 April 2010, the Special Rapporteur participated in the Congress of the Latin American Federation of Magistrates in Mar del Plata, Argentina, where she gave a speech and facilitated a section devoted to the independence of the judiciary in the region. On 22 April 2010, the Special Rapporteur gave the opening speech on the issue "Human rights and judicial independence" at an event organized by the Association of Judges for Democracy and the Centre for Justice and International Law in Tegucigalpa. She also participated in the tenth Biennial Conference of the International Association of Women Judges, held from 11 to 15 May 2010 in Seoul on the theme "Judicial challenges in a changing world", and presented a statement on "Terrorism and global security: threats to the independence of the judiciary in a changing world". On 25 June 2010, the Special Rapporteur attended an event organized by the Judges for Judges Organization in Amsterdam, the Netherlands, on the issue of "The role of the Special Rapporteur and non-governmental organizations" and participated in a panel on cases from various parts of the world in which the independence of the judiciary had been compromised.

7. The Special Rapporteur has been invited by the Government of Mozambique to undertake a mission there from 26 August to 4 September 2010. The report on the mission and the related recommendations will be included in an addendum to the Special Rapporteur's next report to the Human Rights Council. The Special Rapporteur wishes to thank the Government of Mozambique for its cooperation. She also wishes to thank the Government of Mexico for the invitation extended to her. The mission to Mexico will take place for two weeks at the beginning of October 2010. She also wishes to thank the Governments of Burundi, Bulgaria, Georgia and Romania, which have extended invitations to visit their countries.

8. The Special Rapporteur recalls that requests to visit the following countries are pending replies: Angola (request made in 2008), Bangladesh (2007), Cambodia (2006), Cuba (1995), Egypt (1999), Equatorial Guinea (2002), Fiji (2007), Iran (Islamic Republic of) (2006), Iraq (2008), Kenya (2000), Myanmar (2009), Nigeria (1995), Pakistan (2000), the Philippines (2006), Sri Lanka (1999), Tunisia (1997), Turkmenistan (1996), Uzbekistan (1996) and Zimbabwe (2001). Bearing in mind that in situ visits greatly help to dispel misunderstandings and identify appropriate solutions, the Special Rapporteur hopes that invitations from the Governments of the above-mentioned countries will be received in the near future.

III. International standards on impunity

9. The "Set of principles for the protection and promotion of human rights through action to combat impunity" defines impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".[4] Principle 1 provides that impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

10. States bear a responsibility not only to investigate gross violations of human rights, but also to ensure the right of victims to know the truth, to provide adequate reparation and to take all reasonable steps to ensure non-recurrence of the said violations.[5] According to the Human Rights Committee, failure by a State party to investigate allegations of human rights violations or to bring the perpetrators to justice could in and of itself give rise to a separate breach of the International Covenant on Civil and Political Rights.[6] Those obligations arise in particular in respect of violations recognized as criminal under either domestic or international law[7] and concern the investigation and punishment of the acts not only of those acting in an official capacity, but also of private actors. The Committee against Torture, in its General Comment No. 2, has stressed that the failure of the State to exercise due diligence to intervene to stop and to sanction torture and to provide remedies to victims facilitates and enables non-State actors to commit with impunity acts impermissible under the Convention. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.[8]

11. When it comes to gross human rights violations and international crimes, such as extrajudicial executions, enforced disappearance, torture, human rights treaties establish more specific obligations for State parties, which clarify the meaning of the right to an effective remedy for victims.[9] In this respect, specific provisions exist in the Convention against Torture[10] and in the International Convention for the Protection of all Persons against Enforced Disappearances[11] (which is not yet in force) concerning the duty of States to establish their jurisdiction in order to investigate, prosecute and ensure redress for the victims.

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[4] Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1).

[5] See Principle 1 of the updated set of principles.

[6] See, for instance, Human Rights Committee, General Comment No. 31, "The nature of general legal obligations imposed on States parties to the Covenant", paras. 15 and 18.

[7] Ibid., para. 18.

[8] Committee against Torture, General Comment No. 2, para. 18.

[9] See Human Rights Committee, General Comment No. 31, para. 16.

[10] Articles 5, 7, 12, 14.

[11] Articles 9, 11, 12, 24.

12. The Commission on Human Rights, in its resolution 2003/72, expressed its conviction that the practice and expectation of impunity for violations of international human rights or humanitarian law encourage violations and are among the fundamental obstacles to the observance and the full implementation of international human rights and humanitarian law. The Commission recognized that exposing violations of human rights, holding the perpetrators, including their accomplices, accountable, obtaining justice for their victims, as well as preserving historical records of such violations and restoring the dignity of victims through the acknowledgement and commemoration of their suffering, would guide future societies and were integral to the promotion and implementation of all human rights and fundamental freedoms and to the prevention of future violations. It also recognized that crimes such as genocide, crimes against humanity, war crimes and torture were violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States, and urged all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes.[12] In its resolution 2005/81, the Commission recognized that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urged States to take action in accordance with their obligations under international law, welcomed the lifting, waiving or nullification of amnesties and other immunities, and recognized that United Nations-endorsed peace agreements could never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights.[13]

13. The Special Rapporteur's predecessor addressed the question of impunity as it relates to amnesty laws, noting the incompatibility of broad amnesty laws with human rights standards.[14] He recommended to the Human Rights Council, among other things, that in order to help combat impunity and uphold the right of victims to truth, justice and reparation, it might be useful to create an international database on what are known as justice and reconciliation processes so as to give the States concerned access not only to technical assistance but also to best practices and case law on which they can base themselves.[15] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has considered that impunity continues to be the principal cause of the perpetuation and encouragement of torture.[16] The Special Rapporteur on extrajudicial, summary or arbitrary executions has addressed the role of criminal justice systems, police investigations, prosecutions, commissions of inquiry, oversight mechanisms and witness protection programmes in combating impunity.[17] The Working Group on Enforced or Involuntary Disappearances has noted that impunity for enforced disappearances remains a problem and has called upon States to prevent impunity by taking lawful and appropriate steps to bring to justice those alleged to have committed enforced disappearances before ordinary courts.[18] The Human Rights Committee has elaborated on the obligations to investigate and prosecute human rights violations

[12] See E/2003/23, chap II.A, resolution 2003/72.
[13] E/2005/23, chap. II.A, resolution 2005/81, para. 3.
[14] E/CN.4/2005/60, paras. 46-48.
[15] E/CN.4/2004/60, para. 75.
[16] See A/54/426, paras. 47-48, A/56/156, paras. 26-33.
[17] See A/HRC/14/24, A/HR/14/24/Add.8, A/63/313.
[18] A/HRC/13/31, para. 650.

and has expressed concern when legislation adopted by States may contribute towards impunity.[19]

IV. Defining the role of the criminal justice system in combating impunity

14. Criminal justice systems are variously structured; commonly they are composed of the investigating or judicial police, the prosecutors and the courts. In some jurisdictions, all those institutions are part of the criminal justice system, while in other jurisdictions, institutions such as the police and the prosecution are part of the executive branch. In other situations, the prosecution is established as an autonomous institution. Defence lawyers, public defenders, victims and members of their families, independent institutions, administrative bodies, the legislature and executive branches are also critical actors. All of them may have responsibility in the various stages of the criminal justice process, from the investigation to provision of redress. Owing to the complexity of the criminal justice system there is a need for the clear division of functions and tasks to avoid potential overlaps and duplication of work. Thus, coordination and cooperation have to be facilitated to ensure the delivery of justice.

15. Combating impunity entails bringing the perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings.[20] Although international law recognizes all those possibilities, certain offences must be subject to criminal sanctions. The Human Rights Committee has noted that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3 of the International Covenant on Civil and Political Rights in the event of particularly serious violations of human rights.[21] Priority is given to the criminal justice system to undertake the requisite investigations and prosecutions, which at times is the only possible effective protection, for example in case of serious crimes such as executions, killings, forced disappearance and torture. The criminal justice system is indispensable as it is the only institution with the mandate and obligation to conduct investigations and bring criminal proceedings against the perpetrators, default of which may give rise to a breach of international obligations. However, preventing the recurrence of acts of impunity requires the adoption of broader measures, such as executive, policy and administrative actions.[22]

16. Of particular concern are cases in which impunity is directly linked to the action, or is facilitated by the inaction, of those linked to the criminal justice system — such as the investigative or judicial police, or security and intelligence officers — as well as judicial actors, who should be at the forefront of the fight against impunity. This situation is perpetuated, in particular, where there is no

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[19] A/49/40 (Vol.II), chap. IX.B, Communication No. 322/1988, *Hugo Rodríguez v. Uruguay* (views adopted by the Committee on Economic, Social and Cultural Rights on 19 July 1994.)

[20] See E/CN.4/2005/102/Add.1.

[21] Human Rights Committee, *Bautista v Colombia*, Communication No. 573/1993, para. 8.2; *Arhuaco v. Colombia*, Communication No. 612/1995, para. 8.2.

[22] Human Rights Committee, General Comment No. 31, "Nature of the legal obligation on States parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), paras. 17-18.

internal independence or there is a lack of effective oversight mechanisms within the criminal justice system.[23]

V. Challenges to institutions of the criminal justice system in combating impunity

A. Investigative stage

17. An essential feature of a functional criminal justice system is the conduct of effective and prompt investigations. There are many factors which prevent investigators from performing their work effectively, including lack of capacity, scarcity of investigative and technical resources, lack of training and limited human and financial resources. In some cases, investigators may be unable to carry out credible and effective investigations for lack of forensic capacity. This could result in crime scenes not being secured in time, so that fundamental evidence is lost. As criminal activities become more sophisticated, there is a need to adapt criminal investigation processes by making use of the most advanced technological innovations in the field.

B. Prosecution

18. Impunity for human rights violations cannot be combated when cases are not brought before the courts. There are various challenges that prosecutors may encounter in initiating criminal proceedings, including insufficient resources, inadequate professional capacities, poor conditions of service — including inadequate remuneration — understaffing, lack of independence and security concerns. It is essential that prosecutors are independent and impartial in the discharge of their functions. The Guidelines on the Role of Prosecutors stipulate, for instance, that the office of the prosecutor shall be strictly separate from judicial functions.[24]

19. Criminal law requires that cases be proved according to the requisite standards of proof. Cases may be dismissed by the courts owing to insufficiency of evidence or non-compliance of evidence collection methods with international standards. The use in judicial proceedings of evidence obtained through torture has been a preoccupation of the United Nations human rights bodies.[25] A working relationship of cooperation has to be fostered between prosecutors and investigators to ensure that evidence which is gathered is sufficient to sustain criminal charges and that the methods of gathering evidence comply with international law.[26]

20. In some countries, prosecutors work with the judicial police as its investigative arm and the latter can only start an investigation upon the prosecutor's authorization. In that context, it is essential that cooperation between investigative

[23] See A/HRC/11/2/Add.6, paras. 33-37.

[24] Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, para. 10.

[25] See A/61/259; see also article 15 of the Convention against Torture.

[26] See Guidelines on the Role of Prosecutors, para. 16.

and prosecution services are enhanced to ensure that investigations are undertaken promptly and respect international legal norms.

21. In some States discretionary powers are granted to prosecutors to determine which cases will be prioritized, proceed to trial or be discontinued. It should be appreciated that, in such a scenario, those discretionary powers are not absolute and there should be clear guidelines on the discontinuance or prioritization of cases, as this may result in unfairness and arbitrariness in the decision-making process. Where prosecutors decide to discontinue a case, reasonable justification should be provided. Lack of resources should never be a reason for discontinuation.

C. Adjudication

1. Judicial independence

22. Impunity may be perpetuated owing to political interference in the functioning of the criminal justice system and restrictions placed on the exercise of judicial authority. Such interference may be direct or indirect and may emanate from the Government or non-State actors. States must respect and observe the independence of the judiciary[27] and measures should be taken to fully comply with the guarantees of judicial independence. Without independence of the judiciary there is no separation of powers, without which there is no guarantee of the rule of law or democracy.

23. The elements of judicial independence were analysed by the Special Rapporteur's predecessor, including the importance of judicial independence; the selection and appointment of judges and magistrates; the judicial budget; freedom of association and expression; the assignment of court cases; independence within the judiciary; tenure and non-removability; immunity; promotion; conditions of service; judicial salaries; human and material resources; and security and training.[28] As pointed out by the Human Rights Committee in its General Comment No. 32, a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, of the International Covenant on Civil and Political Rights is an absolute right that is not subject to any exception.[29]

2. Operational efficiency

24. The criminal justice system usually has a number of streamlined procedures from commencement of a case before the court to determination of the final order. Such procedures may contribute towards impunity as they may result in inordinate delays, corruption and arbitrariness, especially where they are bureaucratic, unclear or overly complex. Caution has to be taken against developing overly bureaucratic, complicated and inefficient systems which can deter victims and negate access to and the delivery of justice.

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[27] Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, Principle 1.

[28] See A/HRC/11/41.

[29] Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), para. 19 (g).

25. A problem in the court process often manifests itself in the form of case backlog as cases are not adjudicated within reasonable time limits. An endemic backlog of cases can be a reflection of structural and administrative issues in the criminal justice system. This can be as a result of organizational structures in case flow, from registration, case filing, record keeping, rules of procedures and evidence, transfer of case dockets between the various criminal justice institutions, allocation of cases to judges and the appeals process to delivery of the final judgement. Delays in the determination of criminal cases may also result in the violation of rights of the accused person, such as the right to be tried without undue delay[30] and the principle that deprivation of liberty should not be unduly prolonged, especially where the accused has been denied bail.[31] While due consideration should be given to the specific circumstances of each case, such delays have to be reasonably justified and the rights of the accused must be respected at all times.

26. The backlog of cases can also be due to a shortage of judges and prosecutors, which sometimes is so severe that cases are routinely adjourned. In other instances, judges may be unwilling to hear cases, owing to a variety of factors. Reducing the case backlog therefore cannot be achieved solely by employing more judges and court officials; it is also dependent on addressing operational structural deficiencies.

3. Material resources

27. The Basic Principles on the Independence of the Judiciary and applicable regional standards require that States must provide adequate resources to enable the judiciary to properly perform its functions.[32] Often the judiciary receives a negligible share of the national budget as compared to other public institutions. States must take measures to ensure that the judiciary is adequately funded and that there is sufficient infrastructure to allow the justice system to function properly.

28. The problem of insufficient funding for the judiciary has been of concern to the previous Special Rapporteur, who underlined the importance of adequate material resources for the proper functioning of the justice system.[33] In certain countries, court premises are dilapidated[34] or there are insufficient courtrooms to conduct hearings, inadequate office space and a lack of basic material resources, including furniture and basic office equipment such as computers, communication technology and photocopiers. A lack of resources can de-motivate judges as they discharge their functions, and constrain the capacity of the judiciary to adjudicate cases in a timely manner, consequently contributing to undermining the system. The Human Rights Committee has observed that where delays in adjudication are caused by a lack of resources and chronic underfunding, supplementary budgetary resources should be allocated to the administration of justice to the extent possible.[35]

29. The Special Rapporteur is aware that some States, especially those in transition, are financially constrained. However, funding for the judiciary should be

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[30] International Covenant on Civil and Political Rights, article 14.3 (c). See also Human Rights Committee, Communication No. 676/1996, *Yasseen and Thomas v. Guyana* and Communication No. 938/2000, *Siewpersaud, Sukhram and Persaud v. Trinidad and Tobago*.

[31] See Human Rights Committee, Communication No. 818/1998, *Sextus v. Trinidad and Tobago*.

[32] Basic Principles on the Independence of the Judiciary, para. 7.

[33] A/HRC/11/41, paras. 76-77.

[34] A/HRC/8/4/Add.2, para. 33.

[35] CCPR/C/GC/32, para. 27.

prioritized. The failure of a State to fund the judiciary adequately undermines the concept that those who are responsible for human rights violations must be brought to justice,[36] and implies perpetuating a culture of impunity.

4. Enforcement of judicial decisions

30. Article 2.3 (c) of the International Covenant on Civil and Political Rights provides that parties to the Covenant undertake to ensure that the competent authorities shall enforce remedies when granted. Principle 17 of the Basic Principles and the Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that States shall, with respect to claims by victims, enforce their domestic judgements for reparation to victims. States should provide, under their domestic laws, effective mechanisms for the enforcement of reparation judgements.

31. A key obstacle to combating impunity is the inability or unwillingness to enforce judicial decisions and orders. A judicial decision which is not enforced defeats the purpose of seeking recourse from the judicial system, as a remedy cannot be obtained in practice. Perpetrators are not imprisoned, or they are released without serving the complete sentence; compensation is not paid to the victim or members of his or her family, takes prolonged periods to be paid or is insufficient. This ultimately encourages repetition of the commission of human rights violations, crimes and offences, further weakening and undermining the criminal justice system.

32. The Special Rapporteur considers that, in those States where impunity is prevalent, mechanisms should be established to ensure compliance with judicial orders, sentences and resolutions, and that adequate reparation, including economic compensation and restitution, are granted to victims within an adequate time.[37]

D. Defence

33. In criminal cases, the role of the defence lawyer or public defender is indispensable to guarantee a fair trial. This has been recognized in international law under the International Covenant on Civil and Political Rights[38] and the Basic Principles on the Role of Lawyers,[39] which specify that all detained persons have the right to be informed of their right to legal counsel and to access counsel upon arrest or detention or when charged with a criminal offence and in defence during trial. The Special Rapporteur has often raised concerns with Member States on de jure and de facto limitations that are placed on lawyers in accessing their clients, including supervised contacts.[40] The Special Rapporteur has also noted trends of denying or

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[36] See CCPR/C/21/Rev.1/Add.13, para. 18.

[37] See Principle 16 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[38] See article 14.3.

[39] Principles 1, 5 and 8 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

[40] See A/HRC/14/26/Add.1 and A/HRC/11/41/Add.1.

limiting accused persons' access to counsel.[41] All those elements constitute an attack against the basic principle of equality of arms, which is among the main components of the right to a fair trial. In combating impunity there should be strict adherence to procedures of law and human rights standards to ensure equality of arms and that further violations are not committed in the interest of pursuing justice.

34. In the exercise of their duty to defend their clients and in the discharge of their professional activities, lawyers are too often identified, by both State and non-State actors, with the interests and activities of their clients.[42] In some serious incidents, lawyers have been killed for being deemed to act against public interests or by those who are afraid of being implicated by evidence that the accused may give.[43] Safeguards should be put in place to protect lawyers from reprisals for conduct related to the discharge of their professional functions.[44] In instances where there are reprisals, lawyers may cease to represent their clients. Indeed, when a State does not take measures to address threats against lawyers, this can be tantamount to violation of the right to defence under international law.

35. If the services provided by lawyers are to be adequate and sufficient, safeguards guaranteeing due process of law have to be adhered to. They include giving counsel adequate time for a substantive, and not simply formal, preparation of the defence; access to confidential information, including intelligence and military reports; freedom to carry out legal work; and appropriate education and training.[45]

E. Victims and members of their families

36. Individuals bear the consequences of impunity through lack of redress, inadequacy of redress and denial of the right to truth and the right to know.[46] International human rights law recognizes that victims and individuals should be in a position to seek redress and obtain remedies.[47] There are a number of factors that hinder victims and members of their families in accessing the court system. They include exorbitant legal costs, lack of legal aid programmes and lack of awareness of legal rights and entitlements. Witnesses may be unwilling to testify because witness protection programmes are lacking or inadequate, or they are reluctant to report cases to the authorities on the assumption that, most probably, no action will be taken. In that respect, the Special Rapporteur believes that robust and effective witness protection programmes should be developed at the national level as an essential tool to guarantee the security of victims and witnesses.

37. The scope of the remedies available to victims and their families for gross violations of international human rights law and serious violations of international humanitarian law includes the victim's rights to equal and effective access to justice, and

[41] Ibid.
[42] A/64/181, para. 12; E/CN.4/1998/39, para. 181.
[43] See A/HRC/14/26/Add.2, sect. IV.B.
[44] Principles 16 and 17 of the Basic Principles on the Role of Lawyers.
[45] Principle 9 of the Basic Principles on the Role of Lawyers; A/HRC/14/26.
[46] E/CN.4/2004/60, para. 37.
[47] Article 2.3 of the International Covenant on Civil and Political Rights.

access to relevant information concerning violations and reparation mechanisms.[48] The enjoyment of those rights is sometimes impeded because victims may be unwilling to engage with the criminal justice system owing to the insensitivity shown by different players in the criminal justice system. The Basic Principles and Guidelines on the Right to a Remedy and Reparation[49] recognize that victims should be treated with humanity and respect for their dignity and human rights and with care to avoid their retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

38. Under the criminal justice system, since trials are initiated by the State, the role of the victim is usually limited to being a witness. There is limited recognition of the victim as a person with a vested and legitimate interest in the accountability of the judicial process. According to principle 19 of the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes those procedures. The International Criminal Court has recognized that visits by representatives of the Office of the Prosecutor to countries should include meetings with victims.[50] States should guarantee broad legal standing in the judicial process to any victim and to any person or non-governmental organization having a legitimate interest in cases.[51]

39. It is trite to say that due regard must be given to the sensitive nature of criminal investigations and proceedings. However, victims have a legitimate interest in ensuring that justice is delivered, that the nature of the sentence given by the courts is commensurate with the nature of the crime or offence and that they receive adequate compensation. Victims and their families should, where appropriate, receive information, especially with regard to the status of investigations and the progress of the judicial processes. Where there is discontinuance of investigations or trial, the reasons should be communicated to victims or members of their families.

VI. Cross-cutting issues of the criminal justice system that impact on impunity

Normative framework

40. Impunity cannot be combated in the absence of an enabling normative framework providing accountability for crimes and offences, as well as redress for the victim at the judicial and administrative levels.[52] The inadequacy of legal protection

[48] Principle 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[49] Principle 10.

[50] International Criminal Court, "Prosecutorial Strategy 2009-2012", para. 69.

[51] E/CN.4/2005/102/Add.1, Principle 19; Kampala Declaration adopted by the Review Conference of the Rome Statute of the International Criminal Court (Declaration RC/Decl.1) para. 4; and resolution RC/Res 2, "The Impact of the Rome Statute on victims and affected communities", adopted by the Review Conference.

[52] International Covenant on Civil and Political Rights, article 2 (b).

in regard to human rights violations, including serious violations, has been noted by the Human Rights Committee and by special procedures mandate holders.

41. While all States have ratified at least one of the core human rights treaties and most have codified two or more, domestication of the obligations set out in those treaties often remains a challenge. Some national legal systems fail to provide adequate legal protection in regard to violations of human rights, for example through the non-criminalization of serious crimes and offences. Violations are at times perpetuated because of inadequate legislation, where statutes, codes or administrative acts are lacking or inadequate.[53]

42. States should respond urgently by developing legislation to fill gaps in the provision of legal protection in cases of human rights violations. There is a need to amend constitutions and other legislation, including criminal codes, regulations and rules of criminal procedure, to make them consistent with international law and practice. Inconsistency in sentencing can be confronted by the issuance of sentencing guidelines to promote uniformity as well as proportionality of sentencing, without fettering the discretion of the courts.

43. Judges, lawyers, public defenders and prosecutors may also be obstructed in their role of ensuring accountability by "special" provisions and legislation — which may be at variance with international human rights standards — that States sometimes adopt to face particular situations or difficulties. Legislation adopted during states of exception and emergency, or anti-terrorism legislation, for example, may limit the margin of appreciation of judges to adjudicate, and the scope of operation of lawyers and prosecutors to raise impunity and accountability issues.

Corruption

44. Judicial corruption has been identified as a factor contributing to impunity. Combating corruption is often complex as often there is no prima facie evidence of its existence and it may permeate all institutions in the criminal justice system. Corruption in one part of the judicial system may undermine efforts of the whole system to combat impunity; hence it is important that it be addressed holistically.

45. To counter judicial corruption, concrete measures will have to be adopted, such as the disclosure of personal assets by judicial officials and other persons with significant responsibility in the criminal justice system; control mechanisms at the institutional level to ensure the transparency of operations; the establishment of internal oversight bodies and confidential complaint mechanisms; and the regular and systematic publication of activity reports. Additionally, efforts should be made to improve the salaries of judges, magistrates and judicial staff to reduce susceptibility to corruption.

Threats and intimidation

46. When an environment of fear and intimidation exists it often cripples the criminal justice system, resulting in lack of investigation and prosecution of crimes.[54] In such a scenario, even though an adequate criminal justice system is in place, it is not utilized because of fear of reprisals. It is the responsibility of each State to protect judicial actors from attacks, intimidation, threats, reprisals and retaliation

[53] See article 2.3 (b) of the International Covenant on Civil and Political Rights; see also Human Rights Committee, *Mbenge v. Zaire*, Communication No. 16/1977.

[54] See A/HRC/14/26/Add.2.

actions. There is a need for States to understand the root causes of the attacks, threats and intimidation; to identify the actors who perpetrate such threats; to adequately investigate all the allegations and complaints; and to ensure that there is accountability when complaints are proved. Additionally, adequate measures are needed to protect officers of the criminal justice system and their families, especially in highly sensitive cases, such as those involving terrorism, drug-trafficking, and organized crime offences.

47. Impunity cannot be combated in the absence of efficient witness protection programmes. Important recommendations have been made for the development and implementation of such programmes. For example, the Special Rapporteur on extrajudicial, summary and arbitrary executions has analysed the issue of designing those programmes and making them effective.[55] He noted the need to develop policy tools designed to encourage and facilitate greater attention to witness protection in national-level programmes to combat impunity.[56] The United Nations High Commissioner for Human Rights has recommended the development of common standards and the promotion of best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and would strengthen the effective provision by the international community of financial, technical and political support necessary to develop programmes at the national level.[57] Further, the High Commissioner has advanced the view that independent witness protection programmes, although funded by the State, should not be under its control. The report of the High Commissioner to truth,[58] which addresses the issue of witness protection within the framework of criminal procedures relating to gross human rights violations or serious violations of international humanitarian law, can provide guidance for the development of witness protection mechanisms.

Capacity-building and training

48. The Special Rapporteur devoted her most recent report to the Human Rights Council (A/HR/14/26) to the need for strengthening continuing education in international human rights law for judges, magistrates, prosecutors, public defenders and lawyers. She noted that there is a considerable gap between the continuing human rights legal education offered to judicial actors and the outcomes obtained with regard to the application of international human rights law in specific cases. Continuing human rights legal education, in particular to impart adequate knowledge of the relevant international standards and jurisprudence, is an essential tool to foster the capacity of judges, prosecutors and lawyers to combat impunity and ensure accountability.

49. The lack of requisite competences and necessary skills of judges and magistrates has an impact on the ability of judges to administer justice effectively. Combating impunity is not only a criminal law issue, but a human rights concern, since fair trial guarantees must be adhered to and the rights of victims protected. Judges must be aware of their role in combating impunity, aware of the international standards and practice which have been developed to combat impunity and aware of

[55] See A/63/313.
[56] Ibid., para. 70.
[57] Ibid., para. 69.
[58] A/HRC/15/33.

the linkages that the national criminal justice system has with international criminal law and human rights law and other accountability mechanisms, such as truth commissions and administrative bodies.

50. The judiciary must ensure that the obligations that a State has undertaken at the international level to combat impunity are implemented. In cases where there is reluctance by a State to initiate criminal proceedings or where laws and decrees are promulgated to exonerate perpetrators from penal responsibility, a proactive judiciary can recommend the repeal or amendment of laws and decrees, or determine inconsistency of laws with international human rights standards.[59] In order to carry out that function, magistrates and judges must have the necessary knowledge of international human rights law to help them in the analysis, interpretation and application of law.

51. Additionally, candidates for prosecutorial positions need to be adequately trained[60] before qualifying as prosecutors and during their careers, not only on procedural and substantive aspects of penal law and proceedings and argumentation before courts, but on international human rights law and standards relating to combating impunity.[61]

VII. Structuring the criminal justice system to combat impunity

52. The Special Rapporteur is aware that every State confronts peculiar challenges with regard to the effectiveness of its criminal justice system in combating impunity. While there is no one-size-fits-all strategy, there are certain guiding principles that can be taken into account in the development of national strategies to combat impunity, not only from the perspective of the criminal justice system but also more generally. The Special Rapporteur encourages States to adopt a human rights-based approach[62] when developing a strategy on impunity. The principles of participation and inclusion; apportioning the roles of duty-bearers and rights-holders; focus on vulnerable groups; legal empowerment; transparency and accountability; and the identification of obligations, should be taken into account.[63]

53. While best practices have emerged from State practice in regard to combating impunity,[64] care should be taken in transplanting strategies that have worked in other jurisdictions without making the relevant adjustments to cater for exigencies prevailing in a particular jurisdiction. Strategies must be multisectoral, holistic and inclusive of all relevant stakeholders, and must guarantee the participation of victims.[65]

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[59] A/HRC/14/26, para. 70.

[60] Guidelines on the Role of Prosecutors, paras. 1-2.

[61] Ibid., para. 11.

[62] A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Office of the High Commissioner for Human Rights "Frequently asked questions on a human rights-based approach to development programming".

[63] Ibid.

[64] See, for instance, the independent study commissioned by the Secretary-General on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity (E/CN.4/2004/88).

[65] See E/CN.4/2005/102; see also General Assembly resolution 63/182.

Concrete, targeted and deliberate steps should be taken to combat impunity in response to the challenges identified.

54. A strategy to combat impunity will have to be devised within the framework of international human rights law obligations. Recommendations from the human rights treaty bodies, including general comments, and from the universal periodic review mechanism of the Human Rights Council, as well as recommendations of the special rapporteurs can serve as important tools for States in developing strategies to combat impunity. Recommendations and outputs from regional human rights mechanisms should also be taken into account.

VIII. Human rights-based approach to reforming the criminal justice system and combating impunity

Conducting a mapping exercise

55. The initial aim is to identify the root and structural causes of impunity in the criminal justice system and related areas, to ensure that the system is responsive to the needs and challenges prevailing on the ground. This can be in the form of a mapping exercise or situational analysis to understand, in a holistic and multidisciplinary manner, the implementation gaps that exist in the normative framework, public policy and practice, and the criminal justice system.[66] When undertaking the analysis attention must be given to, inter alia, the immediate, underlying and structural causes that contribute to impunity; the identification of impunity; patterns the analysis of power relations and dynamics that perpetuate impunity and understanding the linkages and interrelationship among the various variables. Such a systematic analysis should be, both qualitative and quantitative in its approach.

Creation of a database

56. A useful step would be the creation and design of a database to reflect case registration and the ability to monitor case progress from the reporting/registration of the case to delivery of the final judgment. The Special Rapporteur also considers it essential that all judicial actors should have adequate technological support, including through the development and maintenance of websites where jurisprudence can easily be accessed, cases can be tracked and information about proceedings provided.

Awareness-raising and participation

57. Meaningful demand for remedy is facilitated when victims and members of their families have the requisite knowledge of their rights and entitlements under the law. Measures should be adopted to transfer knowledge to individuals on their human rights entitlements and develop their capacities to claim their rights and to pursue cases. As rights-holders, people should be granted an opportunity to participate in any strategy and legislative framework devised to combat impunity.[67]

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[66] Office of the United Nations High Commissioner for Human Rights, "Rule of law tools for post conflict States: mapping the justice sector" (Geneva, 2006).

[67] See E/CN.4/2004/88, para. 11.

When people are empowered with knowledge, they can act as guarantors to promote State accountability in combating impunity.

Coordination

58. The principle of the separation of powers calls for a coordinated and harmonized system to facilitate the discharge of functions by the different branches of the State. This makes it essential that a coordination body or mechanism meet regularly to address challenges and develop strategies for concerted action. The actors involved in the delivery of justice from the executive, legislative and judicial branches have to coordinate their actions on the basis of clear guidelines apportioning roles and responsibilities.

59. Engagement in this process with civil society; national human rights institutions and ombudsmen; bodies such as councils of magistrates; associations of judges; legal aid institutions; women's and equality commissions; bar associations; and organs and bodies such as OHCHR and the United Nations Development Programme should be guaranteed.

Transparency and accountability

60. Human rights principles and standards relating to judges, magistrates, lawyers and prosecutors recognize that they have to be accountable in the discharge of their functions and that disciplinary proceeding can be initiated against them.[68] Such proceedings have to comply with the standards and safeguards provided in the Basic Principles on the Independence of the Judiciary,[69] the Basic Principles on the Role of Lawyers[70] and the Guidelines on the Role of Prosecutors.[71] In addition to the system of checks and balances that may exist at the national level, internal oversight mechanisms should be established to guarantee the accountability of all actors within the criminal justice system, in order to ensure transparency. Mechanisms such as complaint procedures (confidential and public) should be devised and information-sharing and access to information on the activities of the system should be guaranteed. Judicial actors should report periodically on their activities and be accountable for their actions, while respecting, of course, the principles of independence, impartiality, autonomy and non-interference.

Monitoring the delivery of the criminal justice system

61. A strategy for the criminal justice system should include clear benchmarks and be subject to monitoring and evaluation, with measurable indicators. It is important that any strategy be evaluated periodically to measure effectiveness of delivery in combating impunity and monitor current and emerging gaps. The indicators should utilize both quantitative and qualitative information and be devised to monitor short-, medium- and long-term implementation.

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[68] See A/HRC/11/41, paras. 14-84.

[69] Principles 18 and 19.

[70] Principle 26.

[71] Guideline 21.

IX. The criminal justice system vis-à-vis other accountability mechanisms

62. As indicated in the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,[72] one fundamental element in combating impunity, and of the right to justice, is the inalienable right of victims and their families to the truth, so that they know about the circumstances in which violations took place. In many cases, especially in post-conflict situations, the right to the truth has been implemented by non-judicial bodies — rather than judicial ones — such as commissions of inquiry or truth commissions. Such bodies, when they meet certain criteria and requisites, may also play an important role in combating impunity and ensuring accountability.

63. The Special Rapporteur believes that the work of truth and reconciliation commissions and other commissions of inquiry can be complementary to judicial mechanisms in protecting human rights and combating impunity. For example, Ecuador carried out an important initiative to combat past impunity through the creation of a Truth Commission in May 2007 to investigate human rights violations committed between 1984 and 2008. On 7 June 2010, the Truth Commission published a report based on witness testimony and its own investigations. In Peru, the Commission on the Truth published a detailed document recording the most serious human rights violations and abuses occurred during the internal armed confrontation the country suffered during the 1980s and 1990s. Those reports provided a critically important starting point for addressing impunity for past abuses.

X. Relation between national and international criminal justice to combat impunity

64. The Secretary-General has stated in his report on the rule of law and transitional justice in conflict and post-conflict societies,[73] that domestic justice systems should be the first resort in the pursuit of accountability. While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, no ad hoc, temporary or external measures can replace a functioning national criminal justice system in the long term.

65. There are various examples of countries that have gone through a difficult past and taken steps to investigate and prosecute serious human rights violations. For example, in Argentina, progress has been made towards prosecuting perpetrators of human rights violations committed during the last military dictatorship. Since amnesty laws were repealed in 2003, sentence has been passed on 75 persons, 68 of whom were convicted.[74]

66. It is not always possible to act through the domestic legal system, for various reasons which can include, lack of capacity or political will. This is particularly true

[72] E/CN.4/2005/102/Add.1, principle 2.

[73] S/2004/616, paras. 34 and 40.

[74] Centro de Estudios Legales y Sociales, "Adelanto del Informe 2010 sobre la situación de los derechos humanos en Argentina" (2010).

in transitional justice situations. In those situations, States have the primary responsibility to exercise jurisdiction to investigate crimes, including serious violations of international humanitarian law and gross violations of international human rights law, and bring the perpetrators to justice, assuring fair trial standards and guarantees. Often in such situations there is a need to develop, rebuild or reinforce investigative and prosecutorial capacities at the national level, strengthening the independence and the effectiveness of the judiciary, and establishing an adequate public defence system, and witnesses, and victims' protection and support programmes. Not infrequently there is a need to reform the normative framework as well.

67. In some cases, forms of international cooperation with domestic trials can be a solution, including, for instance, forensic assistance in the investigative phase. The United Nations has made concerted efforts to combat impunity in Guatemala through the International Commission against Impunity in Guatemala. That Commission was established in 2007 with the multidimensional mandate to assist Guatemalan authorities in identifying and dismantling criminal networks that have fostered organized crime and impunity. The Commission carries out investigations and takes part in criminal proceedings, together with the national authorities, following Guatemalan law and procedure. It proposes public policies to strengthen the justice system and assists in the implementation of technical assistance programmes.

68. In other situations, where accountability at the national level is not possible at all because the State is unable or unwilling to conduct effective investigation and prosecution, international criminal justice mechanisms, including international or mixed or hybrid tribunals, may come into play, exercising complementary[75] or supplementary[76] jurisdiction.

69. The Special Rapporteur believes that domestic efforts to combat impunity may be significantly enhanced by States' acceptance and implementation of human rights treaties and their acceptance of optional complaint procedures. The capacity of States to ensure justice for crimes committed in their own territory has been enhanced by the emergence of an increasingly effective international and transnational architecture of justice.

Application of the universal jurisdiction to fill the impunity gap

70. Universal jurisdiction is a critical component in combating impunity. Universal jurisdiction is the ability and competence of the courts of any State to try persons for human rights violations and serious crimes committed outside its territory which are not linked to the State by the nationality of the suspect or that of the victims or by harm to the State's own national interests.[77] The essential role of

[75] As in the case of the International Criminal Court.

[76] This is the case, for instance with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

[77] The International Law Commission has adopted an identical approach in its working definition of universal jurisdiction. Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*"), by Zdzislaw Galicki, Special Rapporteur of the International Law Commission (A/CN.4/571), para. 19. In addition, the same definition is followed in International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p.151. Available from www.ibanet.org.

universal jurisdiction in enforcing international criminal law was recognized six decades ago when the drafters of the 1949 Geneva Conventions required each State party to those treaties to investigate and bring to justice in its courts those responsible for grave breaches of those treaties.

71. International law permits States to exercise universal jurisdiction over (i) crimes under national law of international concern, such as hijacking, hostage taking and terrorist bombing, and (ii) crimes under international law, such as genocide, crimes against humanity, war crimes, extrajudicial executions, forced disappearance and torture. It is increasingly recognized that States not only have the power to exercise universal jurisdiction over those crimes, but also have the duty to do so or to extradite suspects to States willing to exercise jurisdiction. For example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requires States parties, to bring to justice in their own courts persons suspected of torture when they are found in their territories or to extradite them to a State able and willing to bring them to justice.[78]

72. In 2009, in their general observations in the Sixth Committee of the General Assembly, most Member States affirmed that the principle of universal jurisdiction was enshrined in international law and constituted an important tool in fighting impunity for serious international crimes.[79]

73. More than 125 States have included the principle of universal criminal jurisdiction in their legislation.[80] A number of States have enacted legislation providing for universal jurisdiction over certain crimes under international law. They include Austria, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Germany, Guatemala, Honduras, Mexico, Nicaragua, Norway, Panama, Peru, Spain, Switzerland, Uruguay and Venezuela. Few of the States that have enacted such legislation have ever exercised universal jurisdiction.[81]

74. Since the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, States have enacted legislation permitting their courts to exercise universal jurisdiction over grave crimes under international law and to exercise such jurisdiction. Courts in Austria, Denmark, Germany, the Netherlands, Sweden and Switzerland have exercised universal jurisdiction over grave crimes under international law committed in the former Yugoslavia. Courts in Belgium, France and Switzerland have opened criminal investigations or begun prosecutions related to genocide, crimes against humanity or war crimes committed in 1994 in Rwanda, in response to Security Council resolution 978 (1995) in which the Council urged "States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda". Italy and

[78] Article 7.

[79] See www.un.org/ga/sixth/64/UnivJur.shtml. Subsequently, the General Assembly adopted resolution 64/117 on the scope and application of the principle of universal jurisdiction.

[80] Amnesty International, AI Index: IOR 53/008/2007; see also AI Index: IOR 53/002/2001.

[81] Amnesty International, study of state practice of universal jurisdiction at the international and national level.

Switzerland have initiated criminal investigations of torture, extrajudicial executions and forced disappearances in Argentina in the 1970s and 1980s.

75. In 2005, Hissène Habré, the former President of Chad, was indicted by a Belgian court of crimes against humanity, war crimes and torture. The Senegalese authorities arrested Habré in 2005, and in 2006, in response to a request by the African Union, Senegal agreed to prosecute him. Senegal subsequently amended its laws to remove any legal obstacles to Habré's trial. In September 2008, 14 victims filed complaints with a Senegalese prosecutor, accusing Habré of crimes against humanity and torture. In 2005, an Afghan warlord was convicted in the United Kingdom of Great Britain and Northern Ireland for conspiring to take hostages and conspiring to torture during the 1990s in Afghanistan. In 2009, Finland exercised universal jurisdiction in the trial of François Bazaramba, a Rwandan national residing in Finland, accused of participating in the genocide which took place in Rwanda in 1994.

Recent developments in international criminal law

76. The Special Rapporteur follows developments in international justice closely in order to support efforts to strengthen the rules and procedures of the international judicial institutions. She recently reported to the Human Rights Council on current developments.[82] The establishment of international criminal tribunals, and notably the International Criminal Court, represents a historic achievement in combating impunity for international crimes and a milestone development in international criminal justice. As the International Criminal Court operates on the basis of the principle of complementarity, States parties to the Rome Statute are bound to bring their legislation into compliance with the provisions of the Statute.

77. The Special Rapporteur commends States parties that have reviewed and amended their national legislation to bring it into line with the provisions of the Rome Statute of the International Criminal Court. Thirty-three States parties have enacted both complementarity and cooperation legislation, 11 States have enacted cooperation legislation, 12 States have enacted complementarity legislation and 55 States have yet to enact either form of legislation.[83] The Special Rapporteur commends those States that have enacted legislation and encourages others to follow suit.[84] The Special Rapporteur also encourages Member States to become parties to the Statute.

XI. Conclusions

78. The Special Rapporteur believes that there is an urgent need for all States to establish, strengthen and develop a strong judiciary, composed of independent and impartial judges and magistrates, as a fundamental tool for combating impunity.

79. A human rights violation that goes unpunished is the source of the commission of other crimes or violations. Impunity undermines democracy and people's trust in

[82] A/HRC/14/26, paras. 81-90.

[83] Amnesty International, "*International Criminal Court: Rome Statute Implementation Report Card. Part One* (Amnesty International Publications, 2010).

[84] See Kampala Declaration (Declaration RC/Decl.1), para. 7 and resolution RC/RES.1 on complementarity, paras. 2 and 4.

State institutions. In a State governed by the rule of law, the State's commitment is of vital importance in fighting impunity. Its democratic institutions should act on behalf of the people and represent their interests and aspirations, giving a clear profile to the State's policies. When the commitment of those institutions is expressed in a clear, more transparent, defined and consolidated manner the State's policies will be oriented towards combating impunity. When States combat impunity, human dignity will be preserved. The degree of engagement of the State in combating impunity is also a demonstration of its interest in and commitment to guaranteeing the full enjoyment of all human rights to all its citizens.

XII. Recommendations

Broad strategies

80. Impunity affects democracy, the rule of law and the enjoyment of human rights in a radical way. Therefore, each State should consider the degree of impunity in the society as an indicator of its commitment to the fight against impunity, the health of its democracy and the state of the rule of law; it could also be an indicator of the independence of its judiciary. It seems necessary, to combat impunity, that States should consider reviewing their legal framework, analysing the results of current policies and, where required, undertake relevant reforms. It is necessary in each case to prioritize the identification of perpetrators of human rights violations and abuses, crimes against humanity; war crimes; and serious organized crime, particularly that committed by terrorists and mafia elements.

81. States should adopt a human rights-based approach to combating impunity through the criminal justice system. In that respect, the following principles should be taken into account: participation and inclusion, apportioning the roles of duty-bearers and rights-holders, focus on vulnerable groups, legal empowerment, transparency and accountability and the identification of obligations.

82. States should conduct a mapping exercise to identify the root and structural causes of impunity; create and design national databases for case tracking; ensure coordination of the different institutions of the criminal justice system; provide accountability and transparent mechanisms; and develop monitoring strategies.

Criminal justice system

83. The de facto and de jure independence of the judiciary, public defenders and lawyers should be fully respected and measures should be taken to guarantee such independence, in accordance with the major human rights instruments including the International Covenant on Civil and Political Rights, the Basic Principles on the Independence of the Judiciary, the Basic Principles, on the role of Lawyers and the Guidelines on the Role of Prosecutors.

84. Structural and operational reform should be undertaken to address deficiencies in the judiciary, in the prosecution and at the police level, particularly considering deficiencies in the investigative stage, the adjudication of cases and the execution of sentences.

85. States must ensure that their domestic criminal justice system is accessible by citizens and has adequate human, financial and material resources for its operations.

86. Where impunity is prevalent, special mechanisms should be established to ensure compliance with judicial decisions. They should also supervise the granting of reparation, economic compensation or moral satisfaction to the victims within an adequate time.

87. States should take measures to address exorbitant legal costs, lack of legal aid programmes and lack of awareness on the part of the population of their rights and legal entitlements, and to ensure that the criminal justice process is sensitive to the concerns of victims.

88. The development of effective and efficient witness protection programmes and the adoption of security measures should be considered. Judges, prosecutors, lawyers, staff officers, witnesses and victims and members of their families should be safeguarded from threats and intimidation. States should investigate any complaints in that regard and prosecute those found responsible for such acts.

89. Where discretionary powers are granted to prosecutors to discontinue cases, the reasons should be given to victims and members of their families. Clear guidelines should be developed defining the grounds on which cases may be discontinued.

90. Accountability and oversight mechanisms should be developed and measures should be adopted to address corruption, including provision of internal oversight mechanisms, declaration of assets, establishment of confidential complaint mechanisms and improving salaries.

91. States should ensure the provision of adequate training and capacity-building for criminal justice personnel on their role in combating impunity.

International obligations

92. Those States that have not ratified all the core human rights instruments and optional provisions in treaties giving competence to the United Nations treaty bodies to consider communications from individuals, should consider doing so as a measure of furthering State accountability in combating impunity. For the same reason, the Special Rapporteur recommends that Member States that have not yet done so become parties to the Rome Statute of the International Criminal Court.

93. States should urgently develop legislation to provide for legal protection in cases of gross human rights violations, and amend their national legislation to be consistent with international law and practice.

94. States should fully cooperate with the international criminal courts and tribunals, respecting and applying their decisions, including those issued by their prosecutors, and making effective their arrest warrants.

International community

95. The United Nations and particularly the Office of the United Nations High Commissioner for Human Rights, as well as the international community, should continue to provide both substantive and technical support to assist Member States in combating impunity, including, where appropriate and necessary, through international or mixed or hybrid tribunals. Those tribunals, in confronting impunity, should constitute a model and an example in regard to respect of the judicial guarantees for detainees and their right to due process.